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CITATIONS

528155—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 964

STANDARD DREDGING CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 26–30) is reported in 44 F. Supp. 601. The opinion of the Circuit Court of Appeals (R. 37–38) is reported in 132 F. (2d) 322.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1943 (R. 38). The

petition for a writ of certorari was filed on April 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the District Court had power to order compliance with a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division, without a showing or determination that petitioner was subject to the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C., sec. 49. These provisions are set forth in the Appendix.

STATEMENT

On January 31, 1942, the Administrator, pursuant to Section 9 of the Fair Labor Standards Act, applied to the District Court for an order requiring petitioner to produce before the Administrator, or his authorized representatives, certain records described in an administrative subpoena *duces tecum* previously directed to petitioner (R. 4–10). The documents requested by the subpoena were petitioner's records showing wages paid to and hours worked by its employees for the period

from October 24, 1938 (the effective date of the Act), to December 1, 1941, and all contracts and agreements to which petitioner was a party for the performance of "dredging and drill work, levee construction, filling work and excavating work" during that period (R. 16–17).

The application for enforcement alleged, upon information and belief, that petitioner was engaged in the performance of contracts for the dredging of coastal harbors, ship channels and ship canals, navigable rivers, streams and waterways in and about the navigable waters of the United States. It was also alleged that petitioner was engaged in the construction of levees, embankments, bulkheads and breakwaters, the filling and excavating of land, and similar work in and about navigable waters. The application recited that in these and other ways petitioner was believed to be an employer of employees engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938. (R. 5–6.)

The application alleged further that the Administrator had sought to make an investigation of petitioner's business pursuant to Section 11 (a) of the Act, but petitioner had refused to permit any such investigation on the ground that its business was not subject to the provisions of the Act, and that its employees were not engaged in activities covered by the Act, or were subject to the exemption provided in Section 13 (a) (3) for

"any employee employed as a seaman" (R. 6). Thereafter the Administrator issued an Order for Investigation in which he stated that there were "reasonable grounds to believe that the Standard Dredging Corporation * * * has violated the provisions of Sections 7 and 15 (a) (2) of the Fair Labor Standards Act * * *" and "the provisions of Sections 11 (c) and 15 (a) (5) of the Act." (R. 13, 14.) The subpoena *duces tecum* involved in this case was issued pursuant to this Order for Investigation. Petitioner refused to comply with the subpoena on the same grounds it had refused to permit the earlier attempts to investigate its business (R. 8, 18–19).

Petitioner filed an answer to the application for enforcement (R. 20–25) in which it denied that its employees were engaged in commerce or in the production of goods for commerce, and claimed that even if its employees were so engaged, they were exempt under the provisions of Section 13 (a) (3). The answer further asserted that in any event the Administrator was not entitled to inspect the wage records until it had been decided that petitioner's employees "are subject to the provisions of the Act and there has been a violation of Section 7 of the Act" (R. 24). The District Court ordered petitioner to comply with the subpoena, ruling that "the Administrator is not obliged, as a condition of obtaining an enforcement order of his subpoena, to make any

showing tnat the respondent [petitioner here] is engaged in commerce" (R. 29). The Circuit Court of Appeals, in a *per curiam* opinion (R. 37–38), affirmed "on authority of *Perkins* v. *Endicott Johnson Corp.*, 317 U. S. 501."

ARGUMENT

The decision of the court below is a correct application of this Court's decision in the *Endicott Johnson* case, and, therefore, there is no occasion for a writ of certiorari in the instant case.

1. Any conflict between the decision of the court below and that of the Sixth Circuit in the case of *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596, was resolved by this Court's decision in the *Endicott Johnson* case. This Court granted certiorari in the *Endicott Johnson* case because of a "probable conflict" with the Sixth Circuit's holding in the *General Tobacco & Grocery Co.* case (317 U. S. at 502).[1] Although the latter case was not expressly disapproved by the *Endicott Johnson* decision, the similarity of the cases warrants the conclusion that the *General Tobacco* decision must be regarded as having been superseded by the *Endicott Johnson* decision.

[1] No petition for certiorari was filed in that case because the subpoena had been signed by the Regional Director rather than the Administrator and was, therefore, unenforceable under the decision in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357.

Although the Walsh-Healey Act and the Fair Labor Standards Act occupy different areas and contain many different procedural features, both prohibit payment of substandard wages in their respective fields of coverage. To accomplish these purposes the Secretary of Labor, in the one case, and the Administrator of the Wage and Hour Division, in the other, are authorized by the respective statutes to conduct investigations to ascertain whether or not violations of the law have occurred. In both cases, the subpoena power is conferred upon the administrative official to implement his power of investigation and the Federal District Courts are given jurisdiction to order obedience to the subpoenas. The reasoning employed in the *Endicott Johnson* case to hold that enforcement of a subpoena by the District Court does not depend upon proof of coverage applies in the instant case with equal force. The Court there stated that coverage, as well as underpayments, was an "indispensable * * * element * * * of violation" and "was a matter under investigation in the administrative proceeding." (317 U. S. at 508.) Similarly, in the instant case, the Administrator is authorized to ascertain whether or not coverage exists before making the administrative determination to sue for an injunction. Since the evidence sought by the subpoena was plainly relevant to a matter entrusted to the Administrator for investigation, "it was the duty of the District Court to order its

production for the Secretary's [the Administrator's] consideration." (317 U. S. at 509.)

In the interest of efficient administration, the need for investigating the question of coverage and the impracticability of severance of the issues "for separate hearing and decision" are as evident under the Fair Labor Standards Act as under the Walsh-Healey Act. Indeed, enforcement of the subpoena without a determination of coverage should be less objectionable under the Fair Labor Standards Act. The Secretary under the Walsh-Healey Act can reach a final determination as to violations and can impose penalties without resort to the courts. On the other hand, the Administrator's investigations can result in sanctions only after the institution of actions in the court.

2. Every Circuit Court of Appeals which has considered the question, except the Sixth Circuit, has taken the same view as the court below. *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming,* 122 F. (2d) 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming,* 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground, 315 U. S. 357. The case of *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. (2d) 692 (C. C. A. 10), cited by petitioner as in conflict with the de-

cision below, is not in point. The court there affirmed an order requiring compliance with the Board's subpoena, overruling the objections that the Board was guilty of capricious, arbitrary, and fraudulent conduct. The case of *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6), also cited by petitioner as in conflict with the decision below, is from the same Circuit as the *General Tobacco Company* decision, *supra*.[2]

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[2] One district court, ruling that the *Endicott Johnson* decision is inapplicable to subpoenas under the Fair Labor Standards Act, refused to enforce the Administrator's subpoena in the absence of proof by the Administrator of the applicability of the Act. *Walling* v. *News Printing Co.*, 6 Wage Hour Rept. 381 (D. N. J. 1943). Two other district courts, prior to the decision in the *Endicott Johnson* case, made the same ruling. *Walling* v. *Benson and Perkins*, E. D. Mo., Oct. 30, 1942, pending on appeal to the Eighth Circuit; *Fleming* v. *Bank of America National Trust & Savings Assn.*, 5 Wage Hour Rept. 242 (N. D. Calif. 1942).

Most of the district courts, however, have adopted the position of the Administrator. *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed 120 F. (2d) 213 (C. C. A. 1), on the ground that the subpoena was not issued by the Administrator, affirmed, 315 U. S. 784; *Fleming* v. *Minnesota Mines*, 4 Wage Hour Rept. 563 (D. Colo. 1941), reversed, 126 F. (2d) 824 (C. C. A. 10), on same grounds; *Fleming* v. *Mississippi Road Supply Co.*, 4 Wage Hour Rept. 400 (S. D. Miss. 1941), reversed, 127 F. (2d) 727 (C. C. A. 5), on same grounds; *Walling* v. *W. G. Golebiewski, Inc.*, 47 F. Supp. 448 (W. D. N. Y.); *Fleming* v. *G & N Novelty Shoppe*, 35 F. Supp. 829 (N. D. Ill.); *Walling* v. *Grieco*, 6 Wage Hour Rept. 382 (S. D. N. Y. 1943); *Walling* v. *Martin Typewriter Co.*, 48 F. Supp. 751 (D. Maine, 1942), appeal pending C. C. A. 1; cf. *Walling* v. *Mississippi Road Supply Co.*, 5 Wage Hour Rept. 935 (S. D. Miss. 1941), appeal pending C. C. A. 5.

3. Petitioner's suggestion that the decision below makes of the court's functions "a mere mechanical device" (Pet. p. 5) misconceives its effect. There are a number of defenses that may appropriately be made to an application for enforcement of the subpoena. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome (*Hale* v. *Henkel*, 201 U. S. 43); or that the hearing is not of the kind authorized (*Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm.*, 237 U. S. 434); or that the subpoena was not issued by the person solely vested with that power (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for certiorari should be denied.

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MAY 1943.